

Further, as cable modem service is unregulated and cable companies have no duty to share their lines with competitors.¹³

It is apparent that AT&T is motivated to use the regulatory process to strap as many costs and restrictions as possible onto competing advanced services technologies and providers, such as DSL provided by SBC's ASI. The Commission should view AT&T's proposal as an attempt to frustrate competition in the market of high-speed Internet services, to the detriment of consumers, and not as a means of fostering efficient and beneficial competition.

II. XO'S ANALYSIS IS FATALLY FLAWED AND ITS REMEDY PLAN RECOMMENDATIONS SHOULD LIKEWISE BE REJECTED.

XO's comments reflect a wholly incorrect analysis of performance data. Most of the alleged parity misses cited by XO are actually performance successes by SWBT. In addition, virtually every measure discussed by XO is not a DSL related metric. For these reasons, and others, XO's recommended remedy plan changes should be rejected.

A. XO Has Submitted Incorrect Information to This Commission.

XO lists several measures that it alleges that SWBT has missed in Texas during the last twelve months.¹⁴ XO's analysis makes it apparent that XO does not understand how the

all residential "advanced services" subscribers and 78% of all residential "high-speed" subscribers); Scott C. Cleland, "How Broadband Deployment Skews Economic/Business Growth," *Precursor Group*, 2/22/01 (citing that cable modem providers have a greater than 70% market share in the residential broadband service). According to the most recent statistics available from the FCC, there were 5.2 million residential and small business high-speed lines nationwide as of December 2000. These lines comprised approximately 3.3 million cable modem lines, 1.6 million ADSL lines, 100,000 satellite and fixed wireless lines, and 200,000 high-speed lines provided with other types of technology. FCC High-Speed Services Report, August 2001, Table 3.

¹³ See Memorandum Opinion and Order, *MediaOne Group, Inc., Transferor to AT&T Corp., Transferee*, ¶ 126-28, CS Docket 99-251 (rel. June 6, 2000) ("*MediaOne/AT&T Merger Order*"); Memorandum Opinion and Order, *In the Matter of Tele-Communications, Inc. Transferor to AT&T Corp., Transferee*, ¶ 96, CS Docket 98-178 (rel. Feb. 18, 1999) ("*TCI/AT&T Merger Order*"); *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

performance plan actually works or even how parity is determined under it. The Z score associated with each measure establishes whether, as a statistical matter, SWBT has provided parity performance. In general, parity is achieved if the Z score is less than 1.68. It appears that XO has departed from this established protocol and instead defined a parity miss as any situation in which XO's result is (even slightly) worse than the comparable SWBT value.

Using the agreed upon method from the T2A to determine parity, the following results for XO were extracted from performance data reports published on August 20:¹⁵

- PM 58-06 (Houston): XO claims that SWBT has failed to meet parity ~~*****~~ months in the past year. In truth, SWBT has made parity during ~~*****~~ of the last twelve months for XO.
- PM 58-01 (Dallas): Contrary to XO's assertion that SWBT has failed to achieve parity on this measure for ~~*****~~ months, SWBT has failed to meet the 1.68 Z value only during ~~*****~~ months. Moreover, during these ~~*****~~ months XO never submitted ~~*****~~ or more orders. Therefore, SWBT has not failed to achieve this measure for XO during the last twelve months.
- PM 58-02 (Dallas): XO alleges that SWBT failed to meet parity during ~~*****~~ out of the last twelve months. In truth, SWBT missed parity during only ~~*****~~ months.

¹⁴ XO Recommendations, pp. 3-4.

¹⁵ See also, Attachment B, which is appended to the Confidential Version.

- PM 58-06 (Dallas): Instead of the ***** months that XO alleges were missed for this measure, SWBT failed to achieve parity during only ***** of the last twelve months.*
- PM 59-01 (Houston): XO claims that SWBT has failed to meet parity during ***** months in the past year. This claim is false. SWBT has missed the performance measure during only ***** months.
- PM 59-02 (Houston): XO states that SWBT has failed to meet parity during ***** of the ***** months in which there is data. Once again, XO is wrong -- SWBT has missed the performance measure during only ***** months.
- PM 59-05 (Houston): XO also completely misstates performance for this measure. Instead of missing ***** out of the last ***** months, SWBT has not missed this measure during the most recent twelve month period.
- PM 59-01 (Dallas): XO alleges that SWBT failed to meet parity ***** out of ***** months. Once again this claim is incorrect. SWBT did miss this measure during ***** months.
- PM 59-02 (Dallas): XO states that SWBT failed to meet parity during ***** of the ***** months in which there were available data. XO is again mistaken in its assessment. SWBT failed to achieve parity during ***** out of the ***** months which had at least ten circuits in service for XO.

* XO also states that SWBT "(f)ailed to meet parity ***** of ***** months for which XO had data." XO Recommendations, p. 3. Although XO fails to identify the pertinent measure, SWBT believes it to be PM 58-06

- PM 59-05 (Dallas): Contrary to XO's claim that SWBT missed this measure during ***** out of ***** months, SWBT has failed to achieve parity only ***** during the most recent twelve month period.
- PM 65.1-02 (Houston): XO is once again incorrect in alleging that SWBT has failed to meet parity in ***** of the ***** months. SWBT has missed this measure only *****
- PM 65.1-02 (Dallas): XO states that SWBT has failed to meet parity during ***** of the ***** months in which there is data. Once again, XO is wrong -- SWBT has never missed this performance measure.
- PM 67-05 (Houston): XO is also incorrect when it states that SWBT failed to achieve parity during ***** out of ***** months. The Z score for this measure has never approached the 1.68 threshold. In addition, there has never been more than ***** trouble reports in a single month. As such, the sample size has never been sufficient to meet the T2A's criteria for statistical significance. Consequently, SWBT has never failed to meet this measure.
- PM 67-05 (Dallas): XO is once again incorrect when it alleges that SWBT has failed to meet parity in ***** of the ***** months. SWBT has not missed this measure in any of the last twelve months.

(Central/West Texas). If this is the case, XO is again incorrect in its performance analysis. SWBT has only missed this measure ***** during the last twelve months for XO.

- PM 69-05 (Houston): XO alleges that SWBT failed to meet parity during ***** out of ***** months. XO is again wrong – SWBT has not missed this measure for DSL loops during the last twelve months.
- PM 13-03 - XO states that SWBT has failed to reach parity for this measure during ***** out of the last ***** months. PM 13 is dependent on the order type submitted by the CLEC. Therefore, it is not appropriate to consider only specific CLEC performance, but rather, aggregate CLEC data. The aggregate data reflect that over the past 3 months SWBT EASE had a flow through rate of 89.0% compared to the EDI flow through rate of 86.1%. Although statistically out of parity, the difference of only 2.9% cannot be considered competitively significant given inclusion of orders in the denominator that are not MOG eligible.

B. XO Has Failed to Provide Any Support for Its Recommendations.

As noted previously, XO has not listed any DSL measure which it finds deficient for either itself or the CLEC community. Notwithstanding this fact, XO offers several recommendations to this Commission which it suggests would provide further impetus for SWBT to improve its wholesale performance. All of these recommendations should be rejected.

- XO recommends that SWBT be required to make a separate payment to each CLEC for “liquidated damages” rather than having a credit appear on their CABS bill. This proposal should be rejected out of hand. The credit is designed to compensate the CLEC for alleged deficient telecommunications service from SWBT, and allows the CLEC to

reduce its financial liability to SWBT. XO does not claim that SWBT has failed to provide it the credits to which it is entitled.

- XO alleges that SWBT does not provide DS3 loop data as part of its monthly performance posting. XO is incorrect. DS3 loop data are separately disaggregated within numerous performance measures. For example, DS3 data are reported for PM 58 (Percent SWBT Caused Missed Due Dates) on the page labeled "271 - CLEC - No. 58b" within the EXCEL report for XO. This page immediately follows the sheet with the 8 dB and DS1 measures that XO earlier opined reflected better retail performance.
- XO also supports extending AT&T's suggestions for the DSL measures³⁷ to all technologies or, at the very least, to 8 dB, 5 dB, DS1, and DS3 loops.³⁸ As with the AT&T proposal in general, these modifications to the T2A should be rejected by this Commission. Based on the erroneous conclusions XO made from the reported performance measurement data, it is clear that XO does not understand the remedy plan. Therefore, XO is in no position to advance any remedy plan changes until such time as it acquires a better understanding of the plan. In the meantime, XO's proposals should be dismissed.

III. NO REMEDY PLAN CHANGES ARE NEEDED OR WARRANTED.

There is no reason to change the already strong remedy plan previously approved by this Commission and passed on favorably by the FCC. Neither is there any reason to include the line sharing performance measures within the LMOS audit. SWBT's overall performance for the last

³⁷ AT&T Recommendations, pp. 13-16.

three months for Tier 1 and Tier 2 performance measurements (based on Version 1.7 business rules), remains strong – at 91.7% “met” for two out of the last three months. Moreover, SWBT has provided valid reasons for the statistical difference in its wholesale performance on the few DSL-related measurements focused on by AT&T. Based on these statistical and other important factors, there would be no justification for adopting the changes recommended by AT&T and XO. Equally important is the fact that the remedy plan, under the express terms of the T2A, can only be changed by mutual agreement of the parties. No evidence presented by AT&T or XO has convinced SWBT that a change needs to be made. Therefore, SWBT is not agreeable to any change in the performance remedy plan at this time.

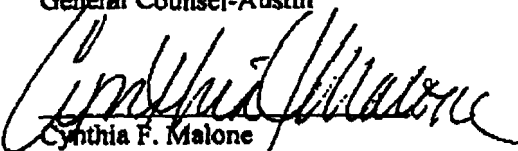
IV. CONCLUSION

AT&T's and XO's criticisms are mistaken and misleading, when considered within the context of the available performance data. Once the data is reviewed and understood, SWBT's overall performance can not be viewed as either anti-competitive or discriminatory. As a result, AT&T and XO's proposed changes to the remedy plan are neither necessary nor warranted. Requiring \$25,000 payments to CLECs by SWBT for violating “the performance standard for a Tier 1 High measure in connection with DSL provisioning or maintenance”²⁸ would only induce CLECs to treat the remedy plan as additional revenue. With SWBT's overall performance remaining strong, the remedy plan agreed to by SWBT and the CLECs during the collaborative process should not be changed.

²⁸ XO Recommendations, pp. 5-6.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Cynthia F. Malone, Senior Counsel, for Southwestern Bell Telephone Company, certify that a copy of this document was served on all parties of record in this proceeding on the 31st day of August, 2001 in the following manner:

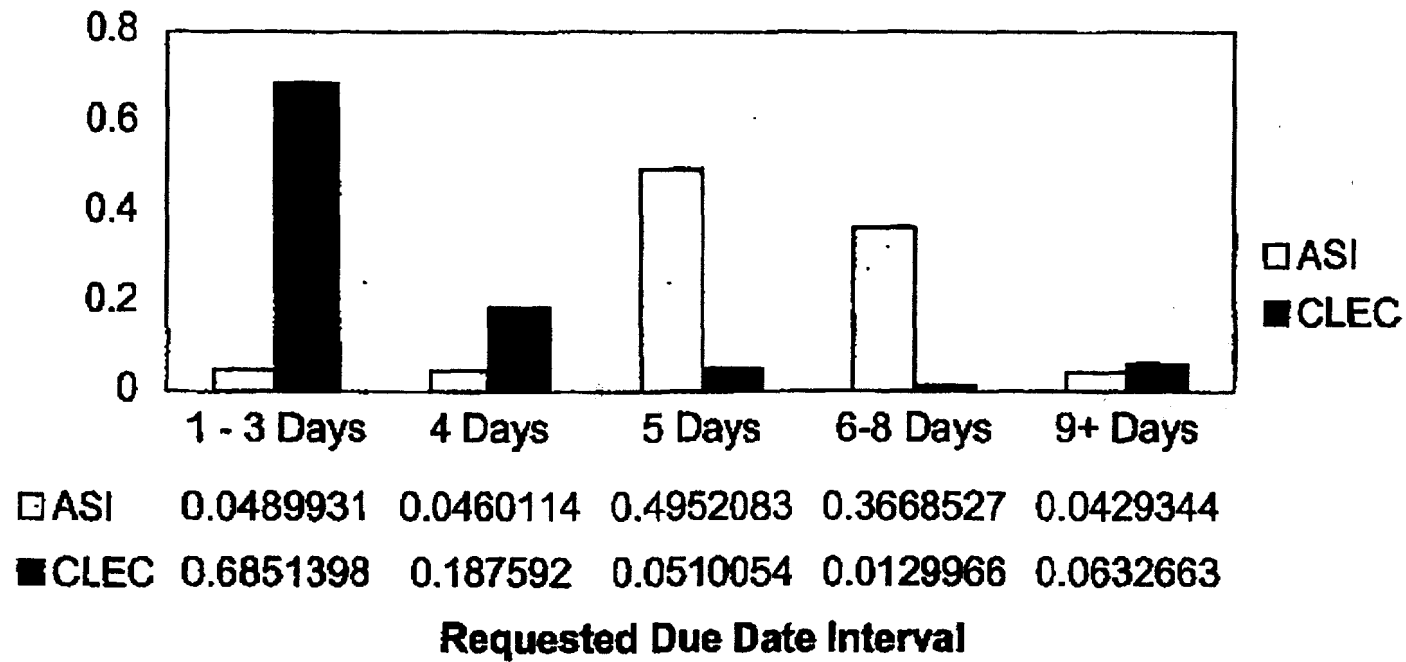
By hand delivery, facsimile and/or by U.S. Mail.



¹⁹ AT&T Recommendations, p. 13.

ATTACHMENT A

Texas DSL Line Share Ordering Practice Feb - June 2001



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SEP 10 2001

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Application of SBC Communications, Inc.)
Pursuant to Section 271 of the)
Telecommunications Act of 1996)
To Provide In-Region, InterLATA Services)
in Arkansas and Missouri)

CC Docket No. 01-194

**DECLARATION OF SCOTT L. FINNEY
ON BEHALF OF AT&T CORP.**

1. My name is Scott L. Finney. I am a District Manager in AT&T's Local Services and Access Management for the SBC Region. In this position, I lead a team working in the area of business applications for UNE loops and DSL deployment in Missouri and other SBC states. This effort entails analysis of SBC's local regulatory filings, including its applications to enter the Missouri long distance market under Section 271 of the Telecommunications Act of 1996 ("the 1996 Act").

2. I joined AT&T in 1998. I have over twenty years of telecommunications industry experience, including positions with Northern Telecom, Tellabs and Ameritech.

3. I have a BSEE from the University of Illinois, Champaign-Urbana, and have completed an M.B.A. at the Keller Graduate School, Chicago, Illinois. I have previously testified on behalf of AT&T in the Section 271 proceedings conducted by the California Public Utilities Commission and in the proceedings before this Commission involving SWBT's previous application for Section 271 authority for Missouri. *See Declaration of Scott L. Finney on Behalf of AT&T Corp., filed April 24, 2001, in CC Docket No. 01-88 ("Finney MO 271 Decl."), which is incorporated herein by reference.*

I. PURPOSE AND SUMMARY OF DECLARATION

4. The purpose of this Declaration is to address whether SWBT is in compliance with its obligations under the 1996 Act, and the Commission's orders, regarding the provision of advanced services, including line sharing.¹ For the reasons stated below, SWBT is not meeting its obligations with respect to advanced services in two significant areas.

5. First, as discussed in Part II, SWBT has not met the requirements of the *ASCENT* decision² that SWBT and its affiliate, SBC Advanced Solutions, Inc. ("ASI"), comply fully with the requirements of Section 251(c) of the 1996 Act. For example, even though SWBT has held itself out as a retail provider of DSL Transport services to residential and end-user customers as a stand-alone service, SWBT has failed to offer those services for resale at wholesale rates, in violation of the resale obligations of Section 251(c)(4) of the 1996 Act and the Commission's November 1999 *Second Advanced Services Order* in CC Docket No. 98-147.³ Moreover, even with respect to the advanced services that SWBT is willing to offer pursuant to Section 251(c)(4) on a highly limited basis, SWBT fails to comply with the remaining requirements of Section 251(c).

6. Second, as discussed in Part III, SWBT has not demonstrated that, in accordance with the Commission's *Line Sharing Reconsideration Order*,⁴ SWBT is providing

¹ See, e.g., Brief in Support of the Joint Application by Southwestern Bell For Provision of In-Region, InterLATA Services in Arkansas and Missouri, filed August 20, 2001 ("Application"), at 48-63, 111-114, 143-144; Affidavit of John S. Habeeb for Arkansas and Missouri ("Habeeb Aff."), ¶ 3; Affidavit of Carol A. Chapman for Arkansas ("Chapman AK Aff."), ¶¶ 70-98, 102-106.

² *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("*ASCENT*").

³ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237 (1999), ¶¶ 3-5 ("*Second Advanced Service Order*").

⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 98-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, released January 19, 2001 ("*Line Sharing Reconsideration Order*").

CLECs with line sharing over fiber-fed loops. Indeed, SWBT makes clear in its Application that it is unwilling to do so.

II. SWBT HAS NOT COMPLIED WITH THE REQUIREMENTS OF SECTION 251(c) AND THE *ASCENT* DECISION REGARDING THE PROVISION OF ADVANCED SERVICES.

7. SWBT contends that: (1) it is offering for resale at a wholesale discount all of the advanced services that it offers at retail, and therefore is in compliance with the discount requirements of Section 251(c)(4); and (2) its offer of those services is consistent with the other requirements of Section 251(c). *See* Application at 49-51 & n.39, 143-144; Habeeb Aff., ¶¶ 15-62. SWBT is incorrect. SWBT is in compliance neither with Section 251(c)(4) nor with the other requirements of Section 251(c).

**A. SWBT Is Not Offering For Resale At Wholesale Rates
All of the Advanced Services That It Provides At Retail.**

8. In its *ASCENT* decision, issued in January 2001, the U.S. Court of Appeals for the District of Columbia Circuit vacated the portion of the *SBC/Ameritech Merger Order* that had exempted the advanced services provided by ASI from the obligations imposed on incumbent LECs by Section 251(c). As SWBT concedes, although the *ASCENT* decision focused on ASI's resale obligations under Section 251(c)(4) of the 1996 Act, the court's opinion plainly holds that ASI — like SWBT — is subject to all of the requirements of Section 251(c). *See* Application at 49 & n.39; Habeeb Aff., ¶ 15.

9. SWBT and its witness, Mr. Habeeb, contend that SWBT and ASI are in compliance with the requirements of Section 251(c)(4) and the *ASCENT* decision with respect to advanced services. Application at 49-50, 143-144; Habeeb Aff., ¶¶ 15-62. SWBT's position is incorrect.

10. SWBT asserts that most of the advanced services that it offers – either through ASI or through its other affiliate, Southwestern Bell Internet Services, Inc. (“SBIS”) -- are not subject to the wholesale discount requirements of Section 251(c)(4) as interpreted in the *Second Advanced Services Order*, because they are “not retail services offered directly to subscribers.” Application at 50-63; Habeeb Aff., ¶¶ 41-43. According to SWBT, the only services that it is required to resell at a discount are: (1) the DSL Transport service that ASI sells at retail to its current “grandfathered” residential customers (and ASI’s obligation to sell these services at a wholesale discount would therefore be limited to those same customers);⁵ and (2) the advanced services that ASI sells at retail to businesses under existing contract service arrangements (otherwise known as customer specific arrangements), or “CSAs.” Application at 50-54; Habeeb Aff., ¶¶ 16-38, 41-44. According to SWBT, ASI will offer for resale the DSL Transport services that it provides on a wholesale basis to information service providers (“ISPs”) only “in accordance with § 251(b)(1)” -- *i.e.*, without a discount. Application at 56 n.46; Habeeb Aff., ¶ 44.

11. SWBT’s description of the sales of advanced services it makes through ASI and SBIS is both misleading and contrary to the facts. For example, SWBT gives the impression that SWBT itself no longer provides advanced services such as DSL Transport services at retail to residential and business end-users.⁶ In reality, SWBT has held itself out to the public as a provider of retail DSL Transport – and is therefore subject to the resale discount

⁵ SWBT concedes that it is obligated to offer DSL transport at a wholesale rates to requesting CLECs who wish to offer such services on a resale basis to the same group of “grandfathered” customers. *See* Habeeb Aff., ¶ 43; 47 C.F.R. § 51.615.

⁶ *See* Habeeb Aff., ¶¶ 32-33; Application at 51-52 (stating that “SWBT formerly sold DSL Transport to end-user customers,” but that such customers were transferred to ASI in accordance with the provisions of the SBC/Ameritech Merger Conditions, and that ASI has “ceased making this DSL transport service generally available on a mass-market basis to end-user customers at retail”).

requirements of Section 251(c)(4), even if the obligations of ASI itself under *ASCENT* are as limited as those described by SWBT.

12. As recently as April 23, 2001, SWBT's web page for Missouri stated that SWBT offered not only a "DSL Internet Package" that combined DSL transport with Internet access provided by SBIS, but also a stand-alone DSL service. SWBT described its stand-alone DSL offering as "*DSL Transport only – Order just the DSL feature and use your current Internet Service Provider (ISP) or an ISP from our ISP Partners Program.*"⁷

13. On April 12, 2001, AT&T confirmed, in telephone conversations with SWBT and an ISP unaffiliated with SWBT, that SWBT made DSL available as a stand-alone retail service directly to business and residential end-users. AT&T was advised by SWBT and the ISP that a SWBT customer could order DSL as a stand-alone service from SWBT while procuring Internet service separately from an independent ISP. AT&T was further advised that in the case of certain unaffiliated ISPs, the customer could choose either to receive a single bill from the ISP for both DSL transport and Internet access services, or could pay SWBT a monthly charge for DSL service and receive a separate bill for the Internet service from the ISP. Finney MO 271 Aff., Att. 3 (Declaration of Nathan L. Garroway).

14. The stand-alone DSL offering on SWBT's web page, and AT&T's conversation with SWBT and the unaffiliated ISP, were described in my testimony in the first Missouri 271 proceeding, which was filed with this Commission on April 24, 2001. Finney MO Decl., ¶¶ 11-13. During the weeks following that filing, SWBT altered its web page. By May 16, 2001, when the parties in the Missouri 271 proceeding filed their reply comments, SWBT

⁷ Finney MO 271 Aff., Att. 1, p. 3 (emphasis added). SWBT's web site further described the "ISP Partners Program" as a program through which independent ISPs and network integrators "act as authorized DSL sales representatives for Southwestern Bell DSL transport services." The web site listed numerous independent ISPs located in nine cities in the State of Missouri. *Id.*, Att. 2.

had deleted from its Missouri web site the “DSL Transport only” listing from its retail list of residential products and services, and the revised web page for residential service described DSL only as part of a “package” of DSL Transport and Internet access.⁸

15. Despite SWBT’s deletion of the “DSL Transport only” listing, even its web page in existence as of May 16, 2001 still made clear that SWBT continued to hold itself out as a provider of DSL transport in Missouri to residential customers. For example, the web page stated that, in lieu of purchasing a combined DSL/Internet package provided by SBIS, a residential customer could obtain Internet service from one of SWBT’s unaffiliated “ISP partners” – which “act as authorized DSL sales representatives for Southwestern Bell DSL transport services.” The web page also continued to list “DSL Transport only” as a retail service available for business customers.⁹ In addition, the web page of one of SWBT’s “ISP partners” continued to confirm that its customers would receive one bill from the ISP for the Internet service and a separate bill from SWBT for the DSL service – a practice referred to as “split billing.” AT&T MO 271 Reply Comments at 29 & Att. 3.

16. Since AT&T noted the problems with SWBT’s web site in the reply comments that it filed in the Missouri 271 proceeding on May 16, 2001, SWBT has made further changes in its web site. Like the web page in effect on May 16, the current web page makes no reference to “DSL Transport only.” Wherever possible, the current web page uses the term “DSL Internet service,” rather than “DSL,” and characterizes DSL Transport as a product sold to ISPs. *See* Habeeb Aff., ¶ 38. Moreover, SWBT has removed its reference to unaffiliated ISPs as “ISP partners” – including the prior description of those ISPs as “authorized sales representatives” for SWBT’s DSL Transport. Instead, the web page now characterizes these

⁸ *See* Reply Comments of AT&T Corp. in Opposition To SBC Communications, Inc.’s Section 271 Application For Missouri, filed May 16, 2001 in CC Docket No. 01-88, at 28 & Att.1 at 3 (“AT&T MO 271 Reply Comments”).

ISPs as “compatible ISPs” and emphasizes their lack of affiliation with SWBT. Copies of relevant pages from SWBT’s current web site are attached hereto as Attachment 1.

17. I have seen no statement by SWBT, either on its web site or in any other publicly available document, that SWBT deleted its “DSL Transport only” offering from its web site for business reasons. SWBT, for example, has not suggested that it made the deletion because consumers expressed insufficient interest in stand-alone DSL service or because, even at the maximum price that consumers would be willing to pay for the service, SWBT could not earn a reasonable profit. To the contrary, in its Application SWBT makes clear that it made the deletion in order to avoid the requirement of Section 251(c)(4) that it resell DSL at a wholesale discount – a requirement that plainly applied, in view of the express offering of stand-alone DSL at retail on its web site at the time of its first Missouri 271 application. Thus, SWBT states that “[t]he website and other published materials (advertising, methods and procedure documents, etc.) that became the subject of comments in the initial Missouri 271 proceeding have been reviewed and revised to eliminate any suggestion that DSL Transport is a retail product.” Habeeb Aff., ¶ 38.¹⁰

18. SWBT’s deletion of “DSL Transport only” appears to be part of a larger effort by its parent, SBC, to avoid the discount obligations of Section 251(c)(4) in all of the regions served by its ILEC affiliates. For example, in the Ameritech region (Illinois, Indiana, Michigan, Ohio, and Wisconsin), following a decision by the Indiana Public Utility Regulatory Commission requiring SBC to make DSL Transport available to CLECS at a wholesale

⁹ AT&T MO 271 Reply Comments at 28-29, Att. 1 at 3, Att. 2 at 1, Att. 4 at 3.

¹⁰ See also Application at 57 (“SBC has modified the web sites that had been identified in the initial Missouri proceedings to make it unmistakably clear that SBC does not currently offer DSL transport services directly to end-user customers at retail but rather offers such services exclusively to ISPs”).

discount,¹¹ ASI announced in an Accessible Letter dated July 31, 2001, that it will no longer DSL Transport using unbundled loops after it migrates to a new OSS for DSL Transport in the Ameritech region, and thereafter will offer DSL Transport *only* on a line-sharing basis, *i.e.*, only when Ameritech provides voice service over the line. A copy of ASI's letter is attached hereto as Attachment 2. Thus, under ASI's new policy a CLEC will be unable to obtain DSL Transport in the Ameritech region to the extent that it provides voice service (and thus cannot provide both voice and DSL service to a customer). Although ASI cites the migration to its new OSS as the reason for its new policy, I am not aware of any technical or other reasons why the migration itself would necessitate such a change.

19. Despite the deletions and revisions in its web page, SWBT still engages in split billing with unaffiliated ISPs. For example, the current web page of one such ISP, Brick Network – which was the ISP contacted by AT&T in April – advised customers that “You purchase the ADSL telephone service from Southwestern Bell” and “You then purchase your internet service from Brick Network.” A copy of Brick's current web page – which was accessed through the list of “compatible ISPs” on SWBT's current web page – is attached hereto as Attachment 3.

20. SWBT states in its application that it is not offering split billing as an option for orders submitted by unaffiliated ISPs after August 1, 2001, and that it is “working with the ISPs to convert existing split-billed accounts to consolidated billing on or before December 31, 2001.” *See* Application at 57; Habeeb Aff., ¶ 28 & Att. D. Regardless of whether SWBT meets its target date, however, the fact remains that SWBT is still performing split billing

¹¹ *See* Indiana PURC Cause No. 41657, *In the Matter of Indiana Bell Telephone Company, Incorporated, d/b/a Ameritech Indiana Pursuant To I.C. 8-1-2-61 For a Three Phase Process For Commission Review of Various Submissions of Ameritech Indiana To Show Compliance With Section 271(c) of the Telecommunications Act of 1996*, ALJ Decision on First Request for Expedited Dispute Resolution (ALJ-EDR-1), issued June 12, 2001, at 5

for customers of unaffiliated ISPs for whom those ISPs submitted orders prior to August 1, 2001. Through its separate billing of these customers, SWBT is still providing DSL Transport at retail on a stand-alone basis.

21. Moverover, the statements made by SWBT's parent, SBC, to the investment community belie SWBT's claims that it has "fixed" its web site offerings to ensure that it cannot be viewed as anything other than a wholesale provider of DSL Transport service. "In its "Investor Briefing" on its 2nd quarter 2001 results, SBC stated that it "[i]ncreased its DSL in-service base to more than 1 million," and that it "views DSL as a strategic growth driver for the future – capable of delivering to business and residential end-users a host of entertainment, information and time-management services, as well as high-speed Internet access."¹² SBC made similar statements when it announced its financial performance for 4th quarter 2000 and 1st quarter 2001 – including a statement that it had 767,000 "DSL subscribers" and "DSL customers" by the end of 2000. *See* Finney MO 271 Aff., ¶ 14 & Atts. 4-5; AT&T MO 271 Reply Comments at 29-30 & Att. 5. It is inconceivable that all of those more than 1 million "subscribers" and "customers" could be ISPs.¹³

22. Because SWBT offers DSL as a stand-alone service at retail, it is required to resell that service to CLECs at a wholesale discount. SWBT notes that the Commission's *Second Advanced Services Order* holds that where an ILEC sells advanced services such as DSL services to ISPs for inclusion in a high-speed offering, those services are not "sold at retail" and

(finding that "Ameritech Indiana is attempting to avoid its clear section 251 obligations by reliance on its creative corporate structure"), *aff'd*, Indiana PURC Order on EDR-1, approved June 28, 2001.

¹² *See* SBC Investor Briefing, "SBC's Second-Quarter Diluted Earnings Per Share Increases 8.9% With Focus on Disciplined Financial Management, Growth Drivers," dated July 25, 2001, at 5 (Attachment 4 hereto).

¹³ Far from portraying itself or its affiliates as a mere wholesaler of DSL Transport to ISPs, SBC's report on its 4th quarter 2000 performance cited its efforts to "strengthen and extend" its relationship with Prodigy Communications (an ISP in which SBC is a "strategic investor") for the purpose of enhancing SBC's ISP capabilities. SBC stated:

are not subject to resale under Section 251(c)(4). Application at 54. But the *Second Advanced Services Order* also holds that where -- as here -- an ILEC is selling advanced services at retail to residential and business end-users, those services *are* subject to the discounted resale obligations of Section 251(c)(4).¹⁴ SWBT clearly has not met that obligation.¹⁵

23. The refusal of SWBT to resell DSL transport at a wholesale discount has a serious adverse competitive impact on CLECs. As previously stated, under SWBT's current policy ASI will offer DSL transport service only "in accordance with § 251(b)(1)" -- that is, without a wholesale discount. *Habeeb Aff.*, ¶ 44. Despite SWBT's assertion that "DSL Transport service is a highly competitive wholesale input" (*id.*, ¶ 29), from a practical standpoint SWBT is currently the only source of DSL for CLECs. Although some other providers of DSL exist, many of them are in such precarious financial condition that CLECs would be unwilling to use them as providers. Covad and NorthPoint, for example, have already filed for bankruptcy protection.

24. Because CLECs would be required to purchase DSL from SWBT, and without a wholesale discount, CLECs could not resell DSL to customers at a price that would be competitive while enabling them to make a reasonable profit. Although SWBT's Application does not specify the price at which it would resell DSL "in accordance with § 251(b)(1)," it is likely that SWBT would charge as high a price as possible, in order to prevent CLECs from

"With more direct control of DSL customer relationships, SBC will be in a stronger position to expand its DSL offerings beyond high-speed access." *Finney MO 271 Aff.*, ¶ 14.

¹⁴ See *Second Advanced Services Order*, ¶ 3 ("advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service").

¹⁵ In view of SWBT's offering of DSL transport as a stand-alone service at retail to business and residential end-users, it is immaterial that "ASI's business plan does not include the mass-marketing of DSL Transport service at retail to end-users," or that "ASI has been transitioning its 'grandfathered' retail DSL customers to ISPs, with those customers' consent." *Habeeb Aff.*, ¶ 33. Whatever ASI's plans or activities may be, SWBT itself has clearly been marketing DSL transport as a stand-alone service on a mass-market basis.

competing in the provision of DSL. Thus, CLECs would be faced with the choice between selling DSL (sustaining financial losses that SWBT does not sustain in its retail operations) or foregoing sales of DSL to avoid losses (in which case they would be at a competitive disadvantage with SWBT, which can provide voice and DSL service to its retail customers).

25. Finally, SWBT is flatly wrong in suggesting that its sales of DSL (through ASI) to SBIS, its ISP affiliate, is the type of wholesale relationship with an ISP which, under the *Second Advanced Services Order*, is exempt from the wholesale discount requirements of Section 251(c)(4).¹⁶ The *Second Advanced Services Order* clearly contemplated an arm's-length, pure wholesale relationship between an incumbent LEC and an *unaffiliated* ISP.

26. SBIS clearly does not perform several key functions of unaffiliated ISPs that, the *Order* found, reinforced the Commission's conclusion that advanced services by an ILEC to an ISP are part of a wholesale relationship – and not retail services subject to the requirements of Section 251(c)(4). As SWBT notes (Application at 55), the *Order* placed particular reliance on a Verizon tariff requiring that the ISP “provide all CPE and wiring to its end-users, provide customer service directly to the end-users, and assume sole responsibility for *marketing, ordering, installation, maintenance, repair, billing and collections* vis-à-vis the end-user subscriber.” *Second Advanced Services Order* ¶ 15 (emphasis added). In this case, contrary to the unaffiliated ISPs that the *Order* cited, SWBT, rather than SBIS, performs key functions vis-à-vis the end-user subscribers of SBIS.

27. First, while it is in the process of eliminating split billing practices for unaffiliated ISPs, SWBT performs – and will continue to perform -- direct billing for SBIS.

¹⁶ See Application at 54-57 (asserting that, in the relationship between ASI and ISPs, the “various indicia of a retail offering” identified in the *Second Advanced Services Order* are not present); *id.* at 59 (stating that “The relationship between ASI and SBIS is analogous in many respects to the relationship between ASI and the unaffiliated ISPs identified in the previous section”); *id.* at 60 (referring to the “wholesale relationship between ASI and SBIS with respect to the DSL telecommunications services”).

Application at 60; Habeeb Aff. ¶ 37. Although SWBT asserts that its contract to perform this service for SBIS is the same generic billing and collection agreement that it offers to “interchange carriers and CLECs,” it does not claim that this agreement is offered to unaffiliated ISPs. *See* Habeeb Aff. ¶ 37; *see also* Application at 60 (describing generic contract as between SWBT and “interchange carriers and other product carriers”).¹⁷

28. Second, pursuant to a joint marketing agreement between SWBT and SBIS, SWBT markets SBIS’s services, and solicits and accepts orders for SBIS. Application at 59; Habeeb Aff. ¶ 35.¹⁸ SWBT states that as part of that agreement, SWBT’s personnel “receive customer inquiries for SBIS’s high-speed DSL Internet access product, verify whether the prospective customer meets the criteria for service that SBIS has established, and transmit customer ordering information directly to SBIS.” Application at 59-60. By contrast, SWBT performs no such arrangement for ISPs.

29. SWBT’s performance of such vital functions as billing, collection, and marketing for SBIS clearly differentiate that relationship from the relationship discussed in the *Second Advanced Services Order*. SWBT is not merely selling DSL to SBIS, but is also performing for SBIS several significant functions – billing, collection, and marketing – that, in a true wholesale relationship, would be performed by SBIS.

30. Furthermore, unlike the relationship between SWBT and unaffiliated ISPs, the relationship between SWBT and SBIS cannot reasonably be called arm’s-length, since SBIS is an affiliate of SWBT. SWBT’s motive in performing these services for SBIS can only be to

¹⁷ In its application, SWBT indicates that it would be willing to contract with unaffiliated ISPs “lacking the systems capability to handle this billing” to perform the billing function on their behalf. Habeeb Aff. ¶ 28 & Att. D at 2. However, SWBT provides no description of the terms and conditions of any such arrangement, including the charge that the unaffiliated ISP would be required to pay for those services. SWBT also does assert that those terms and conditions would be the same as those in its contract with SBIS. In any event, because it is limited to “ISPs lacking the systems capability to handle . . . billing,” the offer clearly would not be available to all ISPs.

give SBIS an advantage over unaffiliated ISPs. It is likely that many unaffiliated ISPs would be interested in entering into a similar contract whereby SWBT would perform some, or all, of the same services that it performs for SBIS, in order to realize the same cost savings that SBIS realizes. In fact, when SWBT offered to perform split billing for unaffiliated ISPs in the past, a number of those ISPs accepted the offer. And, from an economic perspective, SWBT would be expected to welcome the opportunity to perform these services for ISPs, since SWBT would stand to receive additional revenue for performing the services. The fact that SWBT is attempting to terminate its existing split billing arrangements thus can only be due to a desire to hinder unaffiliated ISPs from competing with SBIS.¹⁹

B. In Addition To Failing To Comply With the Wholesale Discount Requirements of Section 251(c)(4), SWBT Has Failed To Comply With the Remaining Requirements of Section 251(c).

31. SWBT contends that it (through ASI) has complied not only with the wholesale discount requirements of Section 251(c)(4), but also with the remaining requirements of Section 251(c). *See* Habeeb Aff., ¶¶ 39-62. However, even if SWBT has complied with the

¹⁸ Although SWBT contends that “SBIS pays SWBT for soliciting and accepting orders for SBIS,” it fails to describe the amount of that payment. *See* Habeeb Aff. ¶ 35.

¹⁹ In contrast to performing significant services exclusively for SBIS, SWBT appears to be attempting to impose as many burdens (*i.e.*, costs) on unaffiliated ISPs, and dictate as many terms to those ISPs, as possible. SWBT’s description of its actions as a mere effort “To clarify the [unaffiliated] ISP’s responsibilities” (Habeeb Aff. ¶ 22) is simply wrong. In connection with its recent requirement that all unaffiliated ISPs have written agreements with ASI by the end of September 2001, SWBT has prepared “Proposed Terms and Conditions” that: (1) specify the exact price to be paid for DSL Transport by the ISPs; (2) require that the ISPs perform marketing, billing, and ordering – the functions that SWBT performs for SBIS – as well as customer service and repair; and (3) require the ISP to provision all customer premises equipment and to provide Virtual Path/Virtual Connection (“VP/VC” information to ASI. *Id.* & Att. A. In addition, SWBT is requiring new unaffiliated ISPs to sign a “DSL Addendum” that not only contains these “clarifications” imposing numerous costs on the ISP, but sets forth provisions that would allow ASI and its data affiliates (who are parties to the addendum) to market lucrative enhanced services directly to the ISP’s own customers and provide them over the line as the DSL. *See* Habeeb Aff., ¶ 23 & Att. B. Section 2(G) of the “DSL Addendum” specifically provides that ASI “may, at its own discretion, provision other applications on the same line that is carrying [the ISP’s] virtual session to the End User location and may fully market such applications and related services.” *Id.*, Att. B, Sec. 2(G). Such enhanced services could include video on demand, video conferencing, and e-commerce applications.

wholesale discount requirements of Section 251(c)(4) (and it has not), it plainly has not met the obligations of the statute in other respects. SWBT, for example, has failed to provide CLECs with parity of access to its OSS or to offer advanced services for resale on terms that are reasonable and nondiscriminatory.

32. Even if the scope of ASI's (and SWBT's own) obligation to resell advanced services at a wholesale discounts is as limited as SWBT asserts, SWBT has not shown that the terms and conditions under which ASI will offer CSAs to resellers at a wholesale discount are reasonable and nondiscriminatory, as required by Section 251(c). SWBT states only that ASI will offer CSAs to any "similarly situated" customer that meets the terms and conditions of that particular arrangement. *Habeeb Aff.*, ¶ 42. Neither SWBT's Application nor its Logix agreement sets forth any criteria for determining when a customer is "similarly situated," or specifies whether a reseller may aggregate the volumes of its individual customers to meet the volume requirements of a particular CSA.²⁰

33. Similarly, although SWBT states that a customer under a CSA with ASI "may be subject to" termination liability under the CSA if it elects to terminate its service with ASI, SWBT fails to describe the extent of that liability. *Habeeb Aff.*, ¶ 42. Because the Commission has stated that termination liability provisions may be inconsistent with the requirements of Section 271, depending on the circumstances, the legality of the termination

²⁰ See *Habeeb Aff.*, ¶ 42; Logix Agreement, Section 11G (Application, App. E-AR, Tab 25, and App. G-MO, Tab 114). The Commission has held that a BOC's requirement that customers be "similarly situated" is presumptively unreasonable to the extent that it "require[s] individual customers of a reseller to comply with incumbent LEC high-volume discount minimum usage requirements so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand." *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599 (1998), ¶ 317 (emphasis added) ("Second BellSouth Louisiana Order"). See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), ¶ 953 ("Local Competition Order"), vacated in part on other grounds sub nom. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), rev'd in part on other grounds sub nom. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Commission has also held that an applicant for Section 271 authority must make "an affirmative showing" that any restrictions on volume aggregation are reasonable. *Second BellSouth Louisiana Order*, ¶ 317.

liability under ASI's CSAs therefore cannot be presumed.²¹ SWBT also fails to explain why customers under CSAs with ASI may be subject to termination liability, whereas – according to SWBT's Application – customers under CSAs with SWBT itself are not. *See* Application at 142 (“Southwestern Bell's customer-specific proposals are available for resale to similarly situated customers without triggering termination liability charges or transfer fees to the end user”). To the contrary, SWBT effectively acknowledges that there should be no distinctions between itself and ASI, because both are “within the same corporate family.” *Id.* at 60.

34. ASI has also attached unreasonable conditions to its obligations. For example, the Logix Agreement provides that services are subject to resale under the agreement “only where there is existing capacity on SBC-ASI's deployed facilities to provide the services.” Logix Agreement, Section 11H. In short, under the agreement ASI can avoid its resale obligations simply by limiting its capacity to the level necessary to serve its present retail customers. This is plainly discriminatory against resellers and their customers.

35. The Logix Agreement also limits ASI's liability for improper installation and maintenance for the resold services that it *does* provide to a refund of “the proportionate charge for period during which the service was affected,” and expressly protects ASI from liability for any other damages, including lost profits and lost revenue. *See* Logix Agreement, Section 3. In short, if ASI improperly installs or maintains a service for the CLEC, the CLEC's

²¹ *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd. 3953 (1999), ¶ 390 (“*Bell Atlantic New York Order*”) (“Although termination liabilities that apply when a customer terminates a contract to take service from another provider could, in certain circumstances, be unreasonable or anticompetitive, they may not on their face put a carrier out of compliance with checklist item 14”); *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, 13 FCC Rcd. 539 (1997), ¶ 222 (“*BellSouth South Carolina Order*”) (“Because, depending on the nature of these [termination] fees, their imposition creates additional costs for a CSA customer that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale. We, therefore, would want to review such fees and request that BOCs provide information justifying the level of cancellation or transfer fees in future applications”).